



RIGHTS STUFF

A Publication of The City of Bloomington
Human Rights Commission

City of Bloomington

November 2009

Volume 124

Recent Changes To The Family & Medical Leave Act

The BHRC does not have authority to enforce the Federal Family and Medical Leave Act (FMLA), but we frequently get questions about it. Some important changes to this law went into effect in January, 2009.

- To qualify as having a "serious health condition," the employee usually must have at least three consecutive full calendar days of incapacity and two visits to a health care provider. The first visit to a health care provider must be within seven days of the onset of the incapacity; both visits must be within 30 days of the onset unless there are extenuating circumstances.

- To qualify as having a "chronic" serious health condition, the employee may be required to provide a medical certification form certifying that he must visit a health care provider at least twice a year for treatment.

- Employers now have five business days (instead of two) to request medical certification after the employee gives notice that he needs to take a leave. If the employer finds the certification is incomplete or insufficient, the employer must give additional written notice of the additional information he needs and must give the employee seven calendar days to correct the problem.

- It is now easier for employers to contact health care providers to clarify or authenticate a medical certification form. The employee's direct

supervisor, however, may not contact the health care provider. A health care provider, leave administrator, manager or human resources professional may contact the employee's health care provider to authenticate or clarify a certification, but the employer may not request additional information beyond what was included in the certification.

- When a serious health condition lasts more than a year, the employer may request a new medical certification every 12-month FMLA period.

- Employers are not required to give perfect attendance awards or other bonuses to an employee who took FMLA leave and fails to qualify for the bonus because he missed work due to FMLA leave, as long as employers treat employees who took equivalent non-FMLA leave the same way.

- Employers may not require employees to accept light-duty assignments instead of taking FMLA leave. If an employee does light-duty work, that time does not count as FMLA leave.

- Military Caregiver Leave permits an eligible employee to take up to 26 work weeks of leave during a single 12-month period to care for a family member with a serious illness or injury incurred in the line of duty. This 26 work-week entitlement is an extension of FMLA job-protected leave beyond the twelve weeks of standard FMLA leave. ♦

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Department of Justice Settles Accessibility Complaints

The U.S. Department of Justice recently announced it had settled several complaints alleging violation of the Americans with Disabilities Act (ADA) or of the Fair Housing Act Amendments (FHAA).

- The City of Philadelphia, Pennsylvania, settled a case involving polling places. Under the terms of the settlement, the City will hire an independent expert to determine the accessibility of about half of the City's 12,000 polling places and make recommendations to make them fully accessible. The Department of Justice will evaluate the remaining polling places. If a location can't be made accessible, the City will be obligated to try to find another location.

- Twelve apartment complexes in Louisville will be made more accessible. The complexes, which contain more than 800 apartments, were

built after the Fair Housing Act Amendments were passed. The amendments require all housing covered by the law to meet accessibility requirements. The defendants will have to retrofit the apartments, reconfiguring bathrooms and kitchens, lowering thermostats and other controls, replacing inaccessible door hardware, modifying walkways, removing steps, providing accessible curb ramps and parking and providing accessible walks to amenities such as clubhouses, pools, mailboxes and trash facilities. The defendants will receive fair housing training, pay \$255,000 to compensate individuals and pay a \$10,000 civil penalty.

- In a similar case, four multi-family housing complexes in Spokane, Washington, will be retrofitted to make them accessible as well. The defendants will reconfigure bathrooms and kitchens, widen doorways, replace inaccessible door

hardware, modify walkways to eliminate excess slopes, provide accessible curb ramps and parking and provide accessible walks to site amenities. These defendants will receive fair housing training, pay \$12,000 to compensate individuals and pay a \$10,000 civil penalty.

- Hammond, Indiana, agreed to grant a requested variance as part of a lawsuit. A man had retrofitted his house to accommodate his wife's disability, multiple sclerosis. After she died, he sought a variance from local zoning laws that said unrelated people could not live together in a single-family district. He wanted to be able to have another person with MS live with him in his accessible home. Under the terms of the settlement agreement, Hammond will grant the variance, provide training to local zoning officials and pay a \$10,000 civil penalty. ♦

Guidelines For Serving Customers With Hearing Impairments

If you have a customer with a hearing impairment, please keep in mind the following:

- Remember that people with disabilities are people first. Their disability comes second.
- It's ok if you make mistakes! You will usually get credit for trying.
- If the customer is not wearing a hearing aid, don't shout, but do speak a little louder. Face the customer, project your voice and speak clearly.
- Be sure you have the customer's attention before you

begin speaking.

- Stand four to six feet from the customer with hearing impairments. Avoid dim lighting so that you can be seen. Your facial expressions, your eyes and your gestures all help further communication.
- If you're in a noisy setting, try to move to a quieter setting. If you can't, you may want to move closer to your customer.
- Try to keep your hands away from your face when you are talking.
- If the customer asks, be willing to communicate via notes, perhaps typed on a computer.

If you own or run a store, you know that you have all types of customers. Some are talkative; some are quiet. Some are easy to please and some are terribly demanding. You will encounter the same variety in customers with disabilities. ♦

(Based on a handout from the City of Bloomington's Council for Community Accessibility)



Questions We Get

Employers often call the BHRC and ask for that list of illegal questions that should never be asked during an interview or on a job application. Before the Americans with Disabilities Act, there were no illegal job interview or application questions, but there were dumb questions. Asking an applicant about his ethnic background is not, by itself, an illegal question. But if you ask that question and then don't make him a job offer, he may well assume that you decided not to hire him because of his ethnic background and file a complaint. Our standard advice is to ask only job-related questions during interviews and on job applications.

When the ADA was passed, it included a provision prohibiting employers from making "inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."

Applicants sometimes call the BHRC and say, "I just applied for a job and the application asked me whether I have a disability. I want to sue." Just the fact that the employer asked a prohibited question does not automatically give the applicant a strong legal case.

Lawrence Baer applied for a job with J.D. Donovan, Inc. a trucking company based in Minnesota, in 2002. He answered several questions on the application, stating that he did not have any disability that kept him from working, that he was physically capable of performing heavy, manual work, that he would be willing to take a physical examination and that he was in good health. But he did not answer the questions on the application asking him if he had ever been injured on the job or how much time he lost from work during the previous three years because of illness. Donovan did not hire him and Baer sued under Minnesota's Human Rights Act, which is similar to the ADA.

The Trial Court said that Donovan had violated the law by asking prohibited questions and required the company to pay a \$500 fine. But the Court found that Baer had not shown that he had suffered unfair discrimination. It said that Baer did not show a genuine interest because he did not answer legitimate questions. Donovan hired at least two drivers whose answers to the challenged questions were nearly identical to Baer's responses. Baer's application showed that he had not

driven the kind of truck Donovan uses for 17 years, which was a relevant factor for the company to consider.

Baer appealed, saying he was entitled to nominal damages and attorney fees because of Donovan's illegal questions. The Court of Appeals disagreed. It said Baer would be an aggrieved party, one entitled to damages, only if Donovan had required him to answer all of the questions. It requested that he answer all of the questions, but it did not require him to do so. Baer could not win damages based only on a "mere violation" of the law. He had to show a "cognizable and compensable injury arising out of the inquiry."

The Court found there was reason to believe that Donovan did not base its decision not to hire Baer on his failure to answer some questions, and that the company had legitimate, nondiscriminatory reasons for not hiring him.

The case is *Baer v. Donovan*, 763 NW 2d 681 (MN Ct. App. 2009). ♦

Age Discrimination Case May Be Reversed

In the August, 2009 issue of Rights Stuff, we talked about *Gross v. FBL Financial Services, Inc.*, 2009 WL 1685684 (U.S. 2009). In June, the U.S. Supreme Court narrowly ruled in this case that to prevail in an age discrimination case, a plaintiff would have to show that his employer's motivating factor in treating him different was his age. It was no longer enough for the plaintiff to show that his age played a part or

a role in the employer's decision. He would now have to show that but for his age, he would not have been treated the way he was.

Now Congress is considering amending the Age Discrimination in Employment Act of 1967 to reverse the *Gross* decision. Senator Tom Harkin of Iowa and Representative George Miller of Cali-

fornia recently introduced bills to make the standard for proving age discrimination the same as the standard for proving discrimination on the basis of race, sex, religion and national origin.

Age discrimination seems to be a growing problem. In 2008, the number of cases alleging age discrimination filed with the EEOC was up 29 percent from 2007. ♦



BHRC Seeks Nominations For Annual Human Rights Award

The Human Rights Commission is seeking nominations for its annual Human Rights Award.

Nominees should be individuals or groups who have made significant contributions to improving civil rights, human relations or civility in Bloomington. The deadline to submit nominations is Wednesday, November 18. Nomination forms are available on the City's web site at www.bloomington.in.gov/bhrc or by contacting the BHRC at 349-3429.

The BHRC encourages nominations

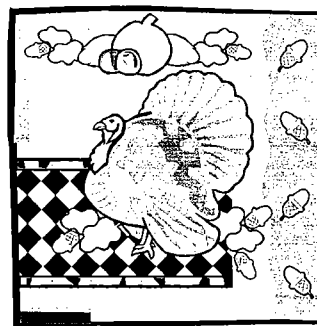
of people or organizations demonstrating success in any of the following categories:

- ensuring equal access to housing, employment or education;
- promoting equality in community life for people with disabilities; and
- advocating and enhancing civility and tolerance.

Past recipients include Bloomington High School North, Bloomington United, Dick McKaig, the Study Circles Project, Daniel Soto, John Clower,

Clarence and Frances Gilliam, the Rev. Ernie Butler, the Council for Community Accessibility, Frank McCloskey, the Bill of Rights Defense Committee, WFHB Radio, Doug Bauder, Lillian Casillas, Helen Harrell and Voices & Visions. ♦

HAPPY THANKSGIVING!!



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